United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7104

In The

United States Court of Appeals

For the Second Circuit

KENNETH A. ANDERSON,

Plaintiff-Appellant,

-against-

ABEX CORPORATION; THE RETIREMENT BOARD OF THE RETIREMENT PLAN FOR SALARIED EMPLOYEES OF ABEX CORPORATION; DONALD K. RENNIE; and ILLINOIS CENTRAL INDUSTRIES, INC.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES

DISTRICT COURT FOR THE DISTRICT OF VERMONT

BRIEF OF APPELLEES

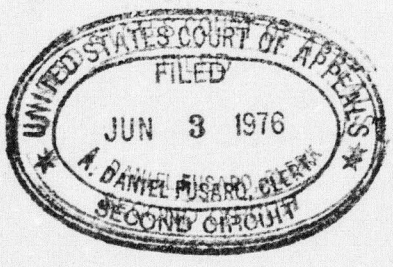

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Table of Contents

Table of Authorities

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Counterstatement of the Issue

Did the district court properly dismiss the complaint for lack of personal jurisdiction where plaintiff failed to plead or make a prima facie showing that the claims asserted arose out of any purposeful conduct by any defendant in Vermont or that any defendant had sought to avail itself of any privilege or benefit under the laws of Vermont.

Statement of the Case

Appellant Anderson was employed by the predecessor of Abex Corporation in 1944 (A-23*) and became eligible for membership in the Retirement Plan for Salaried Employees (A-32). After some 26 years of service, principally at Abex corporate headquarters in New York City, he removed his residence to Vermont (A-56).

For about seven months Anderson continued his employment on a part-time basis, commuting to Abex headquarters in New York City (A-44) two days each week (on the average) and otherwise staying in contact by telephone (A-56). During that period of semi-retirement Anderson performed no services for Abex in Vermont (A-44). There is nothing in the record to suggest that his removal to Vermont was for any reason other than personal preference. In particular, his change in residence was not for the convenience of Abex or at its request or requirement.

In April 1971, Anderson retired from Abex and began to receive pension benefits from the Retirement Plan (A-56). Thereafter he received by mail three administrative letters relating to the Plan (A-51) and periodic reports relating to assets and computation of benefits (A-57).

The evidence is uncontradicted that neither Abex

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* References are to the Appendix to the Brief for Appellant.

nor its corporate parent, defendant Illinois Central Industries, Inc., is qualified to do business in Vermont or is required to so qualify. Neither of those corporations does any business in Vermont; neither has any facilities, offices, agents, salesmen or representatives in Vermont (A-44, 48).* Illinois Central is a holding company which has no business activities outside or Illinois (A-48).

It is also undisputed that the Retirement Board which administers the Retirement Plan lacks any connection with Vermont of the sort just described. In addition, its four members, including defendant Donald K. Rennie, perform all of their duties in New York and the Plan was negotiated, formulated, funded and settled upon the Board in New York and must be construed under the law of New York (A-46-47).

In July 1975, Anderson instituted this action in the District Court for the District of Vermont (A-21-22).

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* In this Court, Anderson properly places no reliance on a hearsay affidavit submitted on motion for rehearing (A-55) purporting to show that certain Vermont corporations had, in a manner unspecified, purchased products manufactured by Abex. That document is incompetent and inadmissable to prove that proposition (Fed. R. Civ. P., Rule 56(e)). Even assuming the truth of that proposition, however, it would provide no basis for personal jurisdiction because, as the district court found, the claims advanced here did not arise out of the sale of such products, as is required by the law of Vermont (A-60-62 and cases cited).

The complaint recites three claims related to the administration of the Retirement Plan. Subject matter jurisdiction over the first two claims is apparently based on diversity; the third claim appears to raise a federal question (A-23-36).

All of the challenged actions of the Retirement Board were performed by the members in New York in the course of their duties there (A-46). The only connection with Vermont is that Anderson received mailed communications informing him of those actions addressed to his personally selected place of residence.

The district court (Holden, C.J.) dismissed each of the claims for lack of personal jurisdiction over all defendants (A-50-52). It denied a subsequent motion for relief from that judgment on similar grounds (A-60-63) and Anderson appealed (A-65).

Argument

POINT I

THE MINIMUM SIGNIFICANT CONTACTS BETWEEN DEFENDANTS AND VERMONT REQUIRED TO SUPPORT IN PERSONAM JURISDICTION DO NOT EXIST.

Anderson does not contest the fact that neither Abex, the Retirement Board, Rennie nor Illinois Central performed any systematic commercial activity in Vermont. Nor does he assert that the claims advanced here arise out of

sales, solicitation of business or similar activity in Vermont. Consequently, cases involving traditional notions of whether a foreign corporation is "doing business", "transacting business", or is "present" in the forum state are inapposite.

The issue, therefore, is not whether this case is controlled by McGee* or Hanson** (Brief for Appellant, p. 11), but whether the due process limitations on assertion of state jurisdiction over nonresidents set forth in Hanson are to be read out of existence.

A. The "Purposeful Activity" Requirement

In cases such as McGee and the earlier International Shoe Co. v. Washington, 326 U.S. 310 (1945), where a foreign corporation engaged in the purposeful solicitation of business in the forum state, either by mail or through salesmen present there, the jurisdiction of the forum state to adjudicate claims arising out of the particular transaction has been recognized as a necessary accomodation to the "increased . . . flow of commerce between States." Hanson, supra, 357 U.S. at 251.

In Hanson, however, the Court was confronted by the assertion that a Florida court had personal jurisdiction over a Delaware trust company which had never solicited or transacted business in Florida. Like the Retirement

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* McGee v. International Life Ins. Co., 355 U.S. 220 (1957)

** Hanson v. Denckla, 357 U.S. 235 (1958)

Plan here, the trust in Hanson had been created in a foreign state (Delaware) by a nonresident settlor. The trust assets were held and administered by the trustee in Delaware. The settlor subsequently moved to Florida and "carried on several bits of trust administration" there, id at 252, including execution in Florida of powers of appointment over part of the trust property, id. at 253. The Court found, however, that Florida could not constitutionally assert personal jurisdiction over the absent trustee.

The crucial facts which distinguish Hanson and the present case from International Shoe and McGee are summarized in two passages:

> ". . . But the record discloses no instance in which the trustee performed any acts in Florida that bear the same relationship to the agreement as the solicitation in McGee. Consequently, this suit cannot be one to enforce an obligation that arose from a privilege the defendant exercised in Florida. 357 U.S. at 252 (second emphasis added).
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> ". . . .
>
> ". . . The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Id. at 253 (emphasis added).

Here, defendants did nothing in Vermont. They did nothing elsewhere intended to exercise any privilege or obtain any benefit under the laws of Vermont. Although in Hanson there were, in addition to the settlor's

residence, other contacts with the forum which some members of the Court thought sufficient to support jurisdiction, 357 U.S. 256-258, here the only connection with Vermont is the fact that Anderson chose to move his residence there.

B. The Spurious "Vermont Connection".

Performing an facile manipulation of the facts, Anderson asserts that this case involves a "contract" between a Vermont resident (himself) and a defendant (unspecified), "consummated in the forum state", giving rise to activity "of a continuous and systematic nature" (Brief, pp. 11-12). The record contains no support for that remarkable conclusion.

To the extent the Retirement Plan constitutes a contract between Anderson and either Abex or the Retirement Board, it is clear that it was entered into long before Anderson moved his residence to Vermont. Anderson was hired in 1944 and, as a salaried employee, became a member of the Retirement Plan (A-32) at a time when defendants had no reason to foresee his relocation to Vermont.

Contrary to Anderson's unsupported statement, the obligations of the plan were in all substantial respects "fixed and binding" before defendants knew of or could foresee his change of residence. Pension benefits under the Plan are determined by various formulae based on length of employment (A-32-36). Since the normal benefit is based on the five consecutive calendar years in which the highest

average salary was received during the last ten years of employment and since Anderson's employment was only part-time after his move to Vermont, it is evident that the benefits he would receive after retirement were fixed before his move on the basis of his service prior to that date.

However, even if Anderson had commuted from Vermont to New York for the entire 26 years of his employment, his residence would not create a "connection" with Vermont sufficient under Hanson to support jurisdiction. The essential element still lacking would be some "purposeful activity" by defendants intended to avail themselves of benefits and privileges conferred by Vermont. Continuing to employ a New York resident who has moved to Vermont to perform services outside Vermont can hardly be said to be "purposeful activity" in that state. Defendants received no benefit from Anderson's selection of Vermont as his place of residence; from defendants' point of view, Anderson's place of residence was a matter of indifference.

Absent some "purposeful activity", whether Anderson's ultimate domicile was "foreseeable" by his employer is of no consequence. Cases subsequent to Hanson have suggested that where there is purposeful commercial activity outside the forum state, a foreign corporation may be subjected to personal jurisdiction if a substantial effect within the foreign

state is intended or foreseeable. But where such an effect cannot be foreseen, the required element of an intention to derive a benefit or privilege under the law of the forum state cannot be found. Compare Deveny v. Rheem Mfg. Co., 319 F.2d 124 (2d Cir. 1963) with Davis v. Saab-Scania of America, Inc., 133 Vt. 317, 339 A.2d 456 (1975) and O'Brien v. Comstock Foods, Inc., 123 Vt. 461, 194 A.2d. 568 (1963).

In Deveny, a product liability case, this Court analyzed the applicable law of Vermont as stated by its highest court:

> ". . . The act by a foreign corporation which will subject it to Vermont's jurisdiction under 12 V.S. A. § 855 must be one which the foreign corporation could know to have potential consequences in Vermont. Otherwise the statute could not be rationalized on the ground that the foreign corporation's subjection to Vermont laws is, in effect, its own doing. This interpretation of the statute would seem to insure its use only in cases where the minimum contacts required by Hanson and McGee are present.
>
> ". . . .
>
> ". . . The wording of the statute which makes a tort committed in whole or in part against a resident of Vermont the basis for that state's assertion of jurisdiction might have given rise to a serious constitutional question had not the Vermont supreme court interpreted it as applicable only where the tort-feasor could know that its act might have consequences in Vermont. (319 F.2d at 124, emphasis added)

The Court went on to find that jurisdiction could not be asserted on facts closely resembling those here:

> ". . . Thus, should a New York plumbing company negligently repair a heater for a New York resident in New York and subsequently the New Yorker move to Vermont with the heater, the erstwhile New Yorker would not be able to avail himself of 12 V.S.A. § 855 in a suit to recover for injuries sustained when the heater exploded in Vermont, for the New York corporation never elected to act in Vermont, as the Smyth case requires, 116 Vt. 569, 80 A.2d 664, 668, quoted above." (Ibid.)*

Thus, it is clear that the question of foreseeability does not even arise until there has been a determination that some purposeful, intentional activity in the forum state was undertaken. That element is not present here. Anderson moved to Vermont carrying his membership in and benefits under the Retirement Plan with him. It was his election, not defendants', that established the only contact with Vermont. No benefit to any defendant from that election is imaginable.

Both the Retirement Plan and federal law** required that routine reports and benefit checks would follow Anderson to his residence, whether it be Vermont, Alaska or Samoa. Defendants had no control over the location to which such matters would be mailed. They did not obtain any privilege or benefit from the fact that such communications were mailed to Vermont rather than New York. In short, the "Vermont connection" did not result from any purposeful activity by any defendant.

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* Section 855 in its present form was enacted after the decisions in O'Brien and Devery. But, "[a]lthough the decisions in these cases dealt with a different long arm statute, their teaching is the same." Miller v. Cousins Properties, Inc., 378 F. Supp. 711 (D. Vt. 1974) (Holden, C.J.).

** 29 U.S.C. § 307, repealed, except as to actions arising before January 1, 1975, 29 U.S.C. §§ 1031, 1144(b)(1)(1974).

C. The "50-State Connection": Constitutional Limitations and Improper Venue.

Anderson is candid in admitting (Brief, pp. 12-13) that if his argument here is successful any corporation, no matter how localized its activities, and the administrator of any retirement plan could be sued in any state in which a retired employee has chosen to locate.

Anderson argues that retiree's choice of a retirement abode may impose upon him certain hardships when he attempts to sue his former employer, while the disadvantage to the employer in defending such actions in a distant forum is minimal. The argument is identical to that expressly rejected in Hanson:

> ". . . Those restrictions [on personal jurisdiction of state courts] are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective states. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him." (357 U.S. at 251).

In addition, Congress has recently completed a sweeping review of legislation regulating retirement plans and enacted the comprehensive Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et seq. That statute includes a new venue provision applicable to actions thereunder, which provides:

> "Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found." (29 U.S.C. § 1132(e)(1)).

That enactment constitutes a significant expansion of the prior statute (29 U.S.C. § 308*) which is applicable to this case and actions arising before January 1, 1975 (29 U.S.C. § 1144(b)(1)). But the facts here are not sufficient to establish proper venue under the expanded statute, even if it were applicable. Even if Hanson permitted the result sought by Anderson, the recent and specific federal legislation on the subject demonstrates a clear legislative intent to stop short of that result in actions relating to pension plan administration.

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* The prior statute provided only that an action could be commenced in 'any court of competent jurisdiction,' leaving the general jurisdiction and venue statutes applicable. This action is therefore governed by 28 U.S.C. § 1391(a) and (b), which provide that an action not founded solely on diversity of citizenship may be brought only in the district where all defendants reside or the claim arose. A corporation may be sued only in the district where it is incorporated, licensed to do business or is doing business. Although the district court did not find it necessary to reach the issue because of its holding on the personal jurisdiction issue, it could also have dismissed the action for improper venue. The action is not founded solely on diversity, defendants dc not reside in Vermont and the claim did not arise there.

POINT II

THE SUMMONS AND COMPLAINT AND SERVICE THEREOF ARE INSUFFICIENT TO CONFER PERSONAL JURISDICTION.

Process in this action was served in the manner provided by Vermont statute (12 V.S.A. §§ 855-6) as permitted by Rule 4(e), Fed. R. Civ. P. Abex, the Retirement Board and Illinois Central were reached by substituted service upon the Vermont Secretary of State. Rennie was served personally in New York by a Federal marshall (A-50-51).

Section 855 V.S.A., governing service on foreign corporations, requires "contact with the state or . . . activity in the state . . . sufficient to support a personal judgment" against the foreign corporation in order for its procedures and those of Section 856 to be applicable. Vermont also requires dismissal of a complaint which does not set forth the facts upon which personal jurisdiction over a foreign corporation is asserted in a manner sufficient to satisfy the statutory requirement, O'Brien v. Comstock Foods, Inc., 234 Vt. 461, 194 A.2d 568, 571 (1963). Since, for the reasons stated in Point I, Anderson does not and cannot plead the minimum facts required, both the complaint and the manner of service thereof are insufficient to confer jurisdiction over Abex and Illinois Central.

In addition, as the district court twice noted

(A-53, n.2; A-62), Section 855 does not apply to the Retirement Board, which is not a foreign corporation, and substituted service upon the Secretary of State was clearly insufficient to confer jurisdiction over that entity. Although Anderson now claims that personal service upon defendant Rennie was sufficient service upon the Board (Brief, p. 14-15), it is clear from paragraph 2 of the complaint (A-23) that Rennie is sued in his individual capacity as a Vice President of Abex and a member of the Retirement Board. Consequently, even if the complaint alleged sufficient contacts with or acitivity in Vermont to satisfy the statute, service of process would have been inadequate to confer jurisdiction over the Board.

Finally, Rennie was presumably served pursuant to Rule 4(e)(1), Vt. R. Civ. P., which is more restrictive than Section 855. Rather than requiring "contact with or . . . activity in the state," that Rule requires "contact or activity in the state" as the predicate for personal jurisdiction over a nonresident person. Since it is indisputable from the complaint and the record that Rennie never had any contact or performed any activity in Vermont, service upon him was also insufficient to establish personal jurisdiction over him individually or, through him, over the Retirement Board.

Since it was conceded below that the Retirement Board is an indispensable party (A-63) it would have been necessary to dismiss the complaint even if some basis had been found for asserting jurisdiction over the corporate defendants.

Conclusion

For the foregoing reasons, the judgment below dismissing the action and the complaint should be affirmed in all respects with costs and disbursements to defendants.

June 3, 1976.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE SECOND CIRCUIT

KENNETH A. ANDERSON, Plaintiff-Appellant, -against- ABEX CORPORATION, et al., Defendants-Appellees.	Docket No. 76-7104 AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

The undersigned, being duly sworn, deposes and says: Deponent is over the age of 18 years, is not a party to this action and resides at 710 Rhinelander Ave., Bronx, NY 10462

On the 3rd day of June 19 76 deponent served the annexed Brief of Appellees (two copies)

upon ~~each of~~ the below listed attorney(s) by depositing ~~a~~ true ~~copy~~ (copies) of the same securely enclosed in a postpaid, properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Richard J. Wright, Esq.
Messrs. DeBonis & Wright
Attorneys for Plaintiff-Appellant
25 Main Street
Poultney, Vermont 05764

Sworn to before me this 3rd)
day of June 19 76)

Karl Davis

KARL DAVIS
Notary Public, State of New York
No. 31-0877345
Qualified in New York County
Commission Expires March 30, 1977

John Murphy

John Murphy